

State Water Resources Control Board  
Informational Proceeding to Develop Flow Criteria for the Delta Ecosystem Necessary to Protect  
Public Trust Resources

**Coalition for a Sustainable Delta's Clarifying Questions in Response to Policy Arguments  
and Assumptions in Written Testimony**

March 9, 2010

Several of the written summaries invite the State Board to improperly ignore its constitutional and statutory duty to determine flow criteria by balancing the needs of public trust resources against the water needs of Californians. But in its December 16, 2009 Notice of Public Informational Proceeding (Notice), the State Water Resources Control Board (State Board) specifically stated that the purpose of the noticed hearing is “to receive scientific information in order to develop new flow criteria for the Sacramento-San Joaquin Delta (Delta) ecosystem necessary to protect public trust resources . . . .” Notice, Attachment A at 1. Accordingly, “[t]he State Water Board is not requesting information or experts to testify regarding legal or policy issues[,]” and “this proceeding will be focused on scientific issues and will not consider policy issues.” *Id.* (emphasis added).

Despite the State Board's explicit admonition, several of the participants, including state and federal resource agencies and non-governmental interest groups, included policy arguments or assumptions in their written summaries of the testimony they have submitted in response to the Notice. Therefore, the Coalition for a Sustainable Delta (Coalition) feels compelled to submit the following response to the policy arguments and assumptions.

**QUESTION #1**

Parties: Department of the Interior, the Nature Conservancy, California Sport Fishing Protection Alliance (CSPA), California Water Impact Network (C-WIN), National Marine Fisheries Service (NMFS), and Environmental Defense Fund.

Excerpts from Written Summaries:

**DOI Written Summary** at 1 (“At the end of this proceeding we believe the Board should have three primary products: defined ecosystem goals . . . , Delta flow criteria that were developed to meet the defined ecosystem goals, . . . and a process to adaptively manage flow criteria to meet the ecosystem goals”);

**The Nature Conservancy Exhibit 1** (focusing exclusively on “Prescriptions for Freshwater Flows to Sustain Desirable Fisheries in the Sacramento-San Joaquin Delta”);

**California Sportfishing Protection Alliance, Testimony of Bill Jennings** at 4 (opining that “[t]he Board is tasked to recommend criteria that will protect the estuary; not balance estuary needs with consumptive needs. Balancing comes later in a formal adjudicatory proceeding”); *id.* at 6 (asserting, without any citation to authority, that “[t]he legislature directed the State Water Board to determine what flows would be protective of the estuarine ecosystem of the Bay-Delta; not to determine whether those flows are compatible with competing needs”);

**Summary of C-WIN Testimony** at 2 (“We urge the Board not to “pre-balance” the flow needs of the fish with some impression of whether water contractors or water project operators would accept the flows or not.”);

**NMFS Written Summary**, *passim*;

**Summary of Testimony: Environmental Defense Fund**, *passim*.

Question and Explanation:

*Do the Department of the Interior, the Nature Conservancy, CSPA, C-WIN, NMFS, or Environmental Defense Fund have any legal authority to support their shared assumption that the flow criteria may be set with the sole aim of “protecting and restoring a healthy Sacramento-San Joaquin Delta ecosystem on a sustainable basis”?*

The State Board cannot ignore its constitutional and statutory duty to balance the coequal goals of water supply reliability and protection of public trust resources in establishing flow criteria for the Delta that will be used to inform the development of the Delta Plan and Bay Delta Conservation Plan.

In SB-1 the Legislature has expressly acknowledged that the Delta must be managed to achieve the coequal goals of protecting natural resources and providing an adequate, reliable supply of water for consumption and use by Californians. SB 1 § 1 amended Public Resources Code § 29702 to read, in relevant part, “The Legislature further finds and declares that the basic goals of the state for the Delta are the following: [¶] (a) Achieve the two coequal goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.” 2009 Cal. Legis. Serv. 7th Ex. Sess. Ch. 5 § 1 (Nov. 12, 2009) (emphasis added); *see also* Water Code § 85001(c); *id.* § 85054 (“‘Coequal goals’ means the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.”). Thus, at this initial stage of the flow criteria proceeding, the State Board is focused on half of the SB 1 equation. Notice at 5 (“the focus of this initial proceeding will be on Delta outflow conditions . . . .”) (emphasis added).

But the State Board itself recognizes that it must, at some point in the proceedings, consider both sides of the equation, and “evaluate the needs of the resources protected by the trust and the need to divert and use water in recognition that ‘[t]he population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values.’” Notice at 4 (citing and quoting *Nat’l Audubon Soc’y v. Superior Court*, 33 Cal.3d 419, 446 (1983)). “Accordingly, before the State Water Board approves a water diversion, it must consider the effect of such diversion[] on public trust resources and avoid or minimize any harm to those resources *where feasible*.” *Id.* (citing *Audubon* at 426) (italics original). In other words, the State Board’s public trust obligations are necessarily limited by the competing public interest in diversions for municipal, commercial, and agricultural uses.

As the Legislature recognized in enacting SB 1, the duty to balance public trust values against other values such as human consumption and agriculture has its roots in the California

Constitution. Water Code § 85023 (“The longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta.”) The Department of Water Resources correctly points out in its written summary that “[t]he standard which governs Board determinations generally, as well as those in the Bay-Delta estuary in particular, is the Constitutional standard of reasonable use and the Water Code injunction to serve the public interest.” *Written Summary of the Dept. of Water Resources*, 1 (Feb. 16, 2010); *see also* Cal. Const. art. X, § 2 (“[B]ecause of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.”).

Significantly, the constitutional mandate that the water resources of California be put to beneficial use for the public welfare is self executing, and cannot be overridden by the Legislature. Cal. Const. art. X, § 2; *Nat’l Audubon Soc’y*, 33 Cal.3d at 443. In Water Code § 1254, the Legislature declared it “to be the established policy of this state that the use of water for domestic purposes is the highest use of water.” And in the *State Water Resources Control Bd. Cases*, 136 Cal.App.4th 674, 778 (2006), the court of appeal concluded that “in determining whether it is ‘feasible’ to protect public trust values like fish and wildlife in a particular instance, the Board must determine whether protection of those values, or what level of protection, is ‘consistent with the public interest.’” *Id.* (emphasis added) (quoting *Nat’l Audubon Soc’y*, 33 Cal.3d at 446-47).

Thus, contrary to what the above written summaries of testimony advocate, the State Board is prohibited by law from determining what level of protection the public trust resources of the Delta ought to receive without balancing the water costs and economic consequences of any proposed level of protection. In terms of this proceeding, this means that the State Board must establish feasible flow criteria by balancing the public trust values against the public interest in water diversions essential to the wellbeing of Californians.

Indeed, only feasible flow criteria can inform the Delta Plan and Bay Delta Conservation Plan, which is the purpose of the informational proceeding. Water Code § 85086(c)(1) provides: “For the purpose of informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan, the board shall, pursuant to its public trust obligations, develop new flow criteria for the Delta ecosystem necessary to protect public trust resources.” (Emphasis added.) The Delta Plan must establish objectives and implementation measures that achieve the coequal goals of reliable water supply and protection of public trust resources. Water Code § 85300(a) (“On or before January 1, 2012, the council shall develop, adopt, and commence implementation of the Delta Plan pursuant to this part that furthers the coequal goals.”). Similarly, “[t]he goal of the BDCP is to provide for both species/habitat protection and improved reliability of water supplies.” Bay Delta Conservation Plan website, <http://www.baydeltaconservationplan.com> (last accessed Mar. 5, 2010).

Finally, if the State Board were to establish flow criteria that it determines are “optimal” for protecting public trust resources, and then, in a subsequent proceeding, set out to determine what flow criteria are actually feasible, there is no scientific basis to assume that simply

approximating the ecologically optimal flow criteria to the extent feasible would be more protective of public trust resources than any other feasible flow criteria that might be formulated based on the best available scientific information.

Thus, the State Board cannot develop flow criteria “for the purposes of informing” those planning efforts if it ignores the public interest in water diversions. Such one-sided flow criteria would fail to fulfill the Legislature’s intent in SB 1. Furthermore, it would also be contrary to public policy to develop flow objectives to aid subsequent planning efforts without considering the legal context within which those efforts will occur (i.e., by failing to balance the coequal goals of the planning processes those objectives are intended to inform).

## QUESTION #2

Parties: NMFS, Environmental Defense Fund, and C-WIN.

Excerpts from Written Summaries:

**NMFS Written Summary at 1** (“[P]rotection of public trust resources means insuring the conditions that will support a sufficient number of self[-]sustaining populations for the species as a whole to be self-sustaining for the foreseeable future – in other words, insuring recovery of the species.”);

**Summary of C-WIN Testimony at 1** (purporting to provide “Optimal Conditions for Public Trust Resources Protection and Recovery . . .” (emphasis added); *id.* at 2 (“C-WIN recommends . . . a precautionary and protective approach in developing Delta outflow criteria . . . needed to enable listed fish species to recover to their former abundance.”); *id.* at 3 (“The Board should seek out and rely on scientific information that establishes and explains the relationships among flow, salinity, food web productivity and species abundance for improving estuarine conditions to a point that listed species recover . . . .”); *id.* at 4 (“C-WIN developed recommendations on optimal conditions to protect and restore Delta ecosystems and fisheries . . . .”);

**Summary of Testimony: Environmental Defense Fund at 1** (“The flow criteria set forth in this testimony are reasonably likely to first restore, then maintain, the Estuary’s public trust resources to viable and self-sustaining levels for the long-term.”).

Question and Explanation:

*Do the National Marine Fisheries Service, Environmental Defense Fund, or C-WIN have any legal authority to support their assumption that protection of public trust resources means insuring recovery of the (listed) aquatic species that reside in or migrate through the Delta?*

The State Board is charged with developing flow criteria for the Delta ecosystem necessary to protect public trust resources, not with developing flow criteria that result in the “recovery” of listed or unlisted species. Specifically, Water Code § 85086(c)(1) provides: “For the purpose of informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan, the board shall, pursuant to its public trust obligations, develop new flow criteria for the Delta ecosystem necessary to protect public trust resources.” Indeed, under Section 7(a)(1) of the federal Endangered Species Act, it is the obligation of the U.S. Fish and Wildlife Service, NMFS, and

other federal agencies, not the State Board, to use their resources to see to the recovery of listed species to a point where the protections of the ESA are no longer required. 16 U.S.C. §§ 1536(a)(1); 1532(3).

As explained above, both the Delta Plan and the Bay Delta Conservation Plan must balance the co-equal goals of protecting the Delta's public trust resources and serving the need of Californians for a reliable water supply. In addition, as explained above, the state Constitution, statutory law, and California Supreme Court and Court of Appeal case law require that the public trust resources be protected to the extent feasible given appropriative needs. Thus, criteria that focus on restoration would not only exceed the legislative mandate, it would result in flow criteria that would be useless in "informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan . . . ." Water Code § 85086(c)(1).

### QUESTION #3

Parties: NMFS

Excerpt from Written Summary:

**NMFS Written Summary** at 1 ("[P]rotection of public trust resources means insuring the conditions that will support a sufficient number of self[-]sustaining populations for the species as a whole to be self-sustaining for the foreseeable future – in other words, insuring recovery of the species.").

Question and Explanation:

*In light of NMFS' conservation obligation under section 7(a)(1) of the Endangered Species Act, on what basis does NMFS maintain that it has no requirement to conserve (i.e., recover) listed species while the State Board has an affirmative obligation to do so?*

Under Section 7(a)(1) of the federal Endangered Species Act, it is the obligation of the U.S. Fish and Wildlife Service, NMFS, and other federal agencies, not the State Board, to use their resources to see to the recovery of listed species to a point where the protections of the ESA are no longer required. 16 U.S.C. §§ 1536(a)(1); 1532(3).

### QUESTION #4

Parties: NMFS; The Bay Institute and Natural Resources Defense Council; and C-WIN.

Excerpts from Written Summaries:

**NMFS Written Summary** at 3 ("Due to the highly imperiled status of many species, if flows are set too low initially and monitoring demonstrates that they are inadequate, some species could be extirpated. Protection of imperiled species in the face of uncertainty requires a precautionary approach.");

**Summary of Testimony of The Bay Institute and Natural Resources Defense Council** at 3 (advocating that the State Board use “the most protective flow recommendation identified using this methodology in order to protect the broad range of public trust resources”);

**Summary of C-WIN Testimony** at 2 (“C-WIN recommends that the State Water Board apply a precautionary and protective approach in developing Delta outflow criteria that takes account of the Estuary’s flows – and the timing, quality (e.g., temperature), and volume of flows – needed to enable listed fish species to recover to their former abundance.”)

Questions and Explanation:

*How can the precautionary approach to establishing flow criteria be reconciled with the State Board’s mandate in the California Constitution and the Water Code (including provisions added by SB 1) to balance the protection of public trust resources against the needs of Californians that depend on water diversions?*

The precautionary approach or “precautionary principle” takes several forms. One common form is:

Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

United Nations Conference on Environment and Development, *The Rio Declaration on Environment and Development*, Principle 15 (19th plenary meeting June 14, 1992), available at [http://www.unin.org/egp/sites/default/files/p10\\_EN\\_rio.declaration.pdf](http://www.unin.org/egp/sites/default/files/p10_EN_rio.declaration.pdf) (last accessed Mar. 9, 2010).

A stronger formulation of the principle recommends that

regulation is required whenever there is a possible risk to health, safety, or the environment, even if the supporting evidence is speculative and even if the economic costs of regulation are high. To avoid palpable absurdity, the idea of “possible risk” will be understood to require a certain threshold of scientific plausibility.

Cass R. Sunstein, *The Paralyzing Principle*, Regulation, 33 (Winter 2002-2003). In addition, the “strong” version of the precautionary principle is not limited to threats of serious or irreversible harm, and it places the burden of proof on the proponent of the activity that is suspected of harming the environment:

When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not established scientifically. In this context the proponent of the activity, rather than the public, should bear the burden of proof.

*Id.* (quoting the Wingspread Declaration (1992)).

While some degree of scientific uncertainty should not stand in the way of sensible regulation to protect natural resources, where the level of uncertainty is substantial there are often compelling reasons to adopt a more nuanced approach than the precautionary principle. For example, in a submission to the National Research Council, the Coalition demonstrated that it is possible that the fall X2 action included by the Fish and Wildlife Service in its 2008 Biological Opinion to protect delta smelt could actually reduce subsequent abundance of delta smelt. There, the exercise of the precautionary principle by the Service to attempt to protect delta smelt combined with uncertainty regarding the effectiveness of the measure proposed to accomplish that goal could have adverse consequences for the species of concern and for water users in California.

Oftentimes, there are risk-risk trade-offs associated with efforts to protect human health and the environment. In the context of the flow proceeding, there may be a trade-off between protecting different species or a tradeoff between protecting a species on the one hand and some other societal good on the other.

In addition, it would be improper to use the precautionary principle to justify formulating flow criteria that would provide for full recovery of listed fish species “to their former abundance,” as C-WIN recommends. As explained in response to Questions #2 and #3, above, under Section 7(a)(1) of the Endangered Species Act, federal agencies, not the State Board, bear the burden of using their resources to achieve the recovery of listed species. As worthy as that goal may be, the State Board is required by law to formulate feasible flow criteria that are protective of public trust resources, but also capable of allowing for a reliable and adequate water supply for Californians.

Finally, as explained under Question #1, above, the Legislature has placed the burden on the State Board to assess the best available scientific information about the Delta as it exists today and is likely to evolve in the future to determine what impact, if any, various flow regimes may have on the Delta ecosystem, and to formulate feasible flow criteria on the basis of that evidence. Thus, the State Board cannot lawfully shift the burden of proof onto participants with an interest in both protecting the Delta and maintaining a reliable water supply.